IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1487

FORD MOTOR CREDIT COMPANY, ET AL.
Petitioners,

vs.

DENNIS MILHOLLIN, ET AL.
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

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The Consumer Bankers Association respectfully submits this Brief as *amicus curiae* in support of the Petitioners, filed upon the written consent of all parties in accordance with Rule 42(2) of the Rules of this Court.*

INTEREST OF AMICUS CURIAE

The Consumer Bankers Association (hereinafter "The Association") is a non-profit organization organized in

* Written consent from counsel for each party has been filed with the Clerk of this Court.

October 1919 to provide a voice for the consumer banking industry. Since that time, the membership of The Association has grown to over 330 commercial banks of all sizes, each actively engaged in extending consumer credit. The members of The Association presently hold obligations representing over $72 billion of consumer credit, more than 55 percent of all consumer credit extended by commercial banks.

Members of The Association engage in a great volume of consumer credit transactions, all of which are subject to the extensive technical requirements of the Truth in Lending Act. Each member is charged by federal law with providing a comprehensive set of credit cost disclosures in connection with each credit transaction. In the case of many members, this applies to hundreds of different transactions each day.

Discharging this responsibility has been rendered virtually impossible by the thousands of court decisions that have applied, limited, reversed or otherwise affected requirements under the Truth in Lending Act. The chaos now characterizing consumer credit regulation results in extensive costs to banks in preparing, revising, printing, reprinting, distributing and redistributing forms and in training and retraining bank personnel in their use.

Only through the judicial recognition and adoption of a single method for imposing requirements under the Truth in Lending Act—a role delegated by Congress to the Board of Governors of the Federal Reserve System—will it be possible to bring order and certainty to this area. The Association's members are vitally interested in having this Court acknowledge the proper role of the Board and thereby end the waste of judicial and economic resources

caused by inconsistent judicial interpretations of hypertechnical requirements of the Truth in Lending Act.

SUMMARY OF ARGUMENT

The recent proliferation of consumer credit has been accompanied by the creation of a complex federal regulatory mechanism that establishes technical requirements in connection with consumer credit cost disclosures.

Since 1969, when the Truth in Lending Act became effective, the technical and often nonsubstantive requirements of the Act have been applied in more than 14,000 lawsuits that have produced an astounding array of inconsistent determinations. The inconsistencies resulting from court interpretations have made uniform national disclosures impossible and created untold creditor frustration in attempting to comply with often contradictory requirements. Moreover, these inconsistencies generate consumer confusion because the massive number of judicial interpretations virtually assures that consumers will not receive identical, and thus comparable, credit cost information.

In attempting to achieve the simple but elusive Congressional objective of providing uniform and meaningful credit cost disclosures, the Act has become a magnet for lawsuits due to judicial interpretations that are virtually limitless in their variations. The technical nature of the Act's requirements and the literally thousands of judicial decisions that attempt to interpret and apply them have subverted the Act's objective of uniform credit cost disclosure. The result is to convert the Act into a universal option to bring lawsuits for grievances wholly unrelated to credit cost disclosure. This inappropriate use of the Act offends public policy and results in increased costs of credit that must be borne by all borrowers.

Judicial deference to the pronouncements of the Board of Governors of the Federal Reserve System would provide order and certainty to this area. Notwithstanding this Court's decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), and an unmistakable Congressional intent that Board pronouncements should be binding, some courts have merely paid lip service or have rejected them altogether.

In this complex area there must be clear and consistent rules on which both creditors and consumers can rely. In most instances, the existence of a single reliable rule is considerably more important than the substance of that rule. Only the Board, as the administrative agency charged by Congress with implementing the Act, can provide certainty by fashioning a comprehensive rule that recognizes the widely diverse national credit industry.

Although the Board has attempted to bring order to federal disclosure requirements, it has been rebuffed by the courts. Despite this Court's clear expression in *Mourning*, the refusal of many courts to show any real deference to Board pronouncements and, in many cases, their outright rejection of them, have resulted in an understandable reluctance on the part of the Board to exercise its authority. This Court should encourage the Board to resolve the numerous inconsistencies that have arisen by admonishing the courts to follow its official Board pronouncements unless they are plainly erroneous. Slightly less authoritative unofficial rulings should be accorded great deference. Only through a clearly enunciated rule that the Board—not courts throughout the country—is to implement the highly technical requirements of the Truth in Lending Act will there be uniformity and order in federal credit disclosure regulation.

ARGUMENT

I. THE ACT IMPOSES DETAILED CREDIT COST DISCLOSURE REQUIREMENTS AND IS TO BE IMPLEMENTED THROUGH A CAREFULLY FASHIONED ADMINISTRATIVE INTERPRETATIVE STRUCTURE

A. The Statutory Purpose And Scheme

A substantial increase in the availability and use of consumer credit, combined with concerns about the lack of consumer awareness about credit costs, produced the Truth in Lending Act (hereinafter the "Act"), which became effective on July 1, 1969.[1] As observed by this Court in 1973:

> By [1968], it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363 (1973). Since that time, there has been an even more rapid acceleration of the trend noted by the Court. As consumer goods consumption has increased and the social stigma against incurring debt has eased, consumer credit has increased to $287.6 billion as of May 31, 1979,[2] an amount three times larger than the $95.9 billion cited by the Court for 1967. As a result, a commercial activity once

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[1] Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968).

[2] 65 *Federal Reserve Board Bulletin* (1979), tables 1.54, 1.55, pp. A41, A42 (updated by "Federal Reserve statistical release" dated July 6, 1979).

limited in both scope and constituency is now of concern and interest to all consumers.

The principal purposes of the Act are to provide meaningful and comparable credit cost information, to foster increased consumer awareness of the cost of credit, and to facilitate shopping among various credit sources.[3] Virtually all credit transactions entered into by individuals for personal, family or household purposes are covered. These transactions range from small personal, unsecured loans to long-term mortgage loans involving hundreds of thousands of dollars.

Recognizing the diversity of the credit market and its continuing evolution, Congress in the words of this Court "determined to lay the structure of the Act broadly."[4] It delegated to the Board of Governors of the Federal Reserve System (hereinafter the "Board") the task of implementing the Act through its regulatory pronouncements.[5]

> The Board shall prescribe regulations to carry out the purposes of this [Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this [Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[6]

As a method of enforcing compliance with this regulatory scheme, the Act provides an express civil remedy for

[3] 15 U.S.C. § 1601.
[4] *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973).
[5] *Id. See also* 15 U.S.C. § 1604.
[6] 15 U.S.C. § 1604.

any violation of any provision of the Act or regulations. This remedy imposes liability upon a creditor without regard to the severity or significance of the violation, and irrespective of whether there was any damage or injury to the consumer. In effect, every violation, however hypertechnical, is treated for statutory damage purposes in precisely the same manner as a major substantive violation. Each violation results in liability for statutory damages equal to two times the finance charge, but not less than $100 or more than $1000.[7] Most significantly, the consumer litigant recovers his costs and attorney's fees.[8]

B. The Administrative Response: Regulations, Official Board Interpretations, And Official And Unofficial Staff Interpretations

Recognizing that the consumer credit industry is diverse and rapidly changing, Congress constructed a multi-leveled regulatory framework to provide the technical disclosure details that it could not possibly include in the statute. The structure consists of four components.

1. Regulation Z

Most notable among the Board's responses was Regulation Z, which filled many of the interstices of the Act by creating a compliance scheme of detailed disclosure requirements for consumer credit transactions.[9]

2. Other Board Pronouncements

To supplement the guidance provided by the Act and Regulation Z, Congress has provided other sources of interpretations upon which creditors can rely. Regulation Z has

[7] 15 U.S.C. § 1640(a)(2)(A)(i).
[8] 15 U.S.C. § 1640(a)(3).
[9] 12 C.F.R. Part 226.

been amended to provide a mechanism for issuing these interpretations and to implement certain amendments to the Act, discussed below.[10] Among these are procedures for issuance of interpretations and the designation of officials "duly authorized" to issue interpretations of Regulation Z.[11] In 1976, the Board amended Regulation Z to establish three categories of regulatory interpretations: "Official Board Interpretations," "Official Staff Interpretations" and "Unofficial Staff Interpretations."[12]

(a) *Official Board Interpretations*

Under procedures established by the Board, the type of interpretation to be issued by the Board or designated officials turns on specifically enumerated criteria. Official Board Interpretations are to be issued "only on potentially

[10] 40 *Fed. Reg.* 30085 (July 17, 1975) (amended 12 C.F.R. § 226.1(c) by inserting a provision, referring to a creditor's defense to civil liability for good faith compliance with Regulation Z and Board Interpretations, to implement Title IV of Pub. L. No. 93-495, 88 Stat. 1518 (Oct. 28, 1974)).

41 *Fed. Reg.* 28255 (July 9, 1976) (amended 12 C.F.R. § 226.1(c) by inserting a provision, referring to a creditor's defense to civil liability for good faith compliance with an Interpretation or approval issued by a duly authorized official or employee of the Board, to implement § 3(b) of Pub. L. No. 94-222, 90 Stat. 197 (Feb. 27, 1976); also inserted 12 C.F.R. § 226.1(d) that provided a procedure for the issuance of Board and Staff Interpretations and designated "duly authorized" officials).

41 *Fed. Reg.* 45537 (Oct. 15, 1976) (technical change to 12 C.F.R. § 226.1(c) by limiting the defense granted to creditors who act in conformity with duly authorized Staff opinions to liability under § 112 [15 U.S.C. § 1611] and § 130 [15 U.S.C. § 1640]).

43 *Fed. Reg.* 18539 (May 1, 1978) (amended 12 C.F.R. § 226.1(d) regarding procedures for issuing Official Staff Interpretations).

[11] *See, e.g.,* 41 *Fed. Reg.* 28255, 43 *Fed. Reg.* 18539, *supra,* n. 10.

[12] 41 *Fed. Reg.* 28255 (July 9, 1976). The notice of amendment states: "The requirements of 5 U.S.C. § 553 with respect to notice and public participation were not followed in connection with these amendments because they are rules of agency organization and are exempt from such procedures under 5 U.S.C. § 553(b)."

controversial issues of general applicability which involve substantial ambiguities in the regulations and raise significant policy questions."[13] The Board announced that it would continue to exercise discretion in determining the proper subjects for Official Board Interpretations. Presumably the Board will limit its opinions to requests that satisfy the two-pronged test of (1) controversial issues of general applicability that (2) raise significant policy questions.[14]

(b) *Official Staff Interpretations*

Official Staff Interpretations are issued only "upon those requests which, in the opinion of the designated officials, require clarification of technical ambiguities in [Regulation Z] or which have no significant policy implications."[15] The Board thus delegated to the Staff much of the burden of making interpretations regarding technical ambiguities in Regulation Z while reserving the significant and controversial policy decisions for Official Board Interpretations.[16]

[13] 41 *Fed. Reg.* 28255 (July 9, 1976). On May 1, 1978, this reference to Official Board Interpretations was deleted because the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Board's *Rules of Procedure* (12 C.F.R. § 262.3) independently provided a procedure for requesting Board action. 12 C.F.R. § 226.1(d) now deals only with Staff Interpretations and procedures. *See* 43 *Fed. Reg.* 18539 (May 1, 1978). Although the procedural reference was changed, the Board's substantive explanation as to the criteria applied in determining the appropriate level of response presumably remains the same.

[14] 41 *Fed. Reg.* 28255 (July 9, 1976).

[15] 41 *Fed. Reg.* 28256 (July 9, 1976). The Board announced that it would, upon formal request of interested parties, reconsider positions taken in Staff Interpretations, and that it might request public comment on certain Interpretations deemed to present controversial or significant policy questions.

[16] The Board did not, however, trivialize the role of Official Staff Interpretations and took steps to prevent this result. The Board spe-

In 1978, the Board amended its procedures for issuing Official Staff Interpretations to provide for a delayed effective date and an opportunity for public comment on them.[17] The amendment provides that Official Staff Interpretations will be published in the *Federal Register* to be effective 30 days after the publication date. If a request for public comment is received or postmarked within 30 days, the effective date of the interpretation will then be suspended. Notice of the suspension of the effective date will be published and the interpretation will be republished for public comment. The public comments are then analyzed and, on the basis of those comments, the Interpretation may be withdrawn or republished in either its initial or a modified form. If public comment has been sought, an Official Staff Interpretation is effective upon its final republication in the *Federal Register.*[18]

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cifically excluded approval of a particular creditor's forms from the authority of the designated officials because "the staff review and approval of individual forms would be impractical in light of the inordinant burden on Board resources and the complexity of relating numerous forms to varied methods of operation." 41 *Fed. Reg.* 28255 (July 9, 1976). The approval of standardized examples of forms was not precluded.

[17] 43 *Fed. Reg.* 18539 (May 1, 1978).

[18] The Board's procedure for issuing Official Staff Interpretations is essentially equivalent to "informal" or "notice and comment" rulemaking under § 553 of the Administrative Procedure Act, 5 U.S.C. § 553. That Act requires that (1) notice of the proposed rule be published in the *Federal Register,* together with certain supporting information specified in the Act; (2) interested parties have the right to participate by submitting written data, views or arguments with or without the opportunity for oral presentation; and (3) the rule be published not less than 30 days before its effective date, except for rules providing exemptions, interpretative rules and policy statements or for good cause found and published with the rule. The final rule must contain a concise general statement of its basis and purpose.

Under the Board's amended procedures, Official Staff Interpretations are published in the *Federal Register* 30 days before they become effective. If there is a request for public comment, the effective date of the interpretation is suspended and the interpretation is published for public comment. After all public comments have been reviewed, a final interpretation is issued, effective upon publication. *See* 43 *Fed. Reg.* 18539, 18540 (May 1, 1978). At least one suggestion that Official Board Interpretations were invalid because of failing to comply with the precise procedural requirements of § 553 of the Administrative Procedure Act, 5 U.S.C. § 553, has been rejected. *See Butler v. First National Bank of Commerce,* 552 F.2d 1112, 1113 (5th Cir. 1977).

The Board itself envisioned that Official Staff Interpretations as well as Board Interpretations would play a significant role in creditor compliance.

> The Board expects that creditor compliance with the Act will be enhanced, thereby reducing litigation over technical violations, as a result of the issuance of official staff interpretations.[19]

The Board also equated the importance and effect of Official Board and Official Staff Interpretations for other purposes. For example, both types of interpretations were to be published in the *Federal Register.*[20] Furthermore, any request for either type of interpretation was to be made in the same form and supported with the same documentation.[21]

(c) *Unofficial Staff Interpretations*

Unofficial Staff Interpretations, also referred to as "Public Information Letters" and "Staff Opinion Letters," are to be issued only "where the protection of Section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response."[22] Public Infor-

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[19] 41 *Fed. Reg.* 28255 (July 9, 1976).

[20] *Id.*

[21] 41 *Fed. Reg.* 28255, 28256 (July 9, 1976).

[22] *Id.* Section 130(f), 15 U.S.C. § 1640(f), provides a defense to claims under the Act based upon good faith conformity with rules, regulations, interpretations or approvals by the Board or its duly authorized officials. *See* pp. 25-32, *infra.*

mation Letters were issued beginning in 1969 to provide advice on the technical provisions of the Act and were cited by this Court in 1973.[23]

II. NUMEROUS JUDICIAL ATTEMPTS TO IMPLEMENT THE ACT HAVE PRODUCED INCONSISTENT RESULTS IN CASES OFTEN INVOLVING TECHNICAL, NONSUBSTANTIVE ISSUES

A. The Effect Of Leaving The Issues Principally To Judicial Resolution

In the decade since 1969, the combination of (1) liability triggered by a violation of any provision of the Act or Regulation Z; (2) guaranteed recovery of at least the minimum amount of statutory damages regardless of the nature of the violation or the absence of any injury; and (3) an assurance that the plaintiff's attorneys will receive a fee, has produced a mass of litigation and a confusing array of judicial determinations on literally hundreds of issues under the Act.

As previously recognized by this Court, Congress intended that the Act would require " '*all* creditors to disclose credit information in a *uniform* manner.' " *Mourning, supra,* 411 U.S. at 364 (*citing* the Report of the House Committee on Banking and Currency) (emphasis added). As a direct result of numerous, inconsistent court decisions, this goal simply cannot now be met. It is now literally impossible for *all* creditors to make *uniform* disclosures without at least some of them incurring liability under the automatic damage and attorney fee provisions of the Act.

[23] *See Mourning, supra,* 411 U.S. at 379.

In some areas, such as the one in which the issue raised in this case arises, the Board has attempted to bring order to federal disclosure requirements only to be rebuffed by the courts. The decision that formed the basis for the holding in the instant case provides but one example. In that case the Ninth Circuit summarily accused the Board of injecting "its own uncertainties," perfunctorily rejected one Official Staff Interpretation and two Unofficial Staff Interpretations and then proceeded to substitute its judgment for that of the Board by fashioning its own unique disclosure rule.[24]

Despite this Court's clear expression in *Mourning*, many other courts have shown little real deference to Board pronouncements and, in many cases, have simply rejected them altogether. That, at best, mixed reception has resulted in an understandable reluctance on the part of the Board to exercise its authority. The courts should be admonished to follow the Board's pronouncements in order to encourage the Board to resolve the numerous inconsistencies that have arisen. Only then will there be uniformity and order in the highly complex area of federal credit disclosure regulation.

[24] The decision of the Ninth Circuit in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), holding that the Act compels a creditor to disclose the creditor's right to accelerate the debt upon the debtor's default, was followed by the Ninth Circuit in the decision below without further clarification or analysis. Without citing additional authority for its conclusion, the court below stated: "We hold on the basis of *St. Germaine* [*sic*] that Ford Credit is liable to the Milhollins for failure [*sic*] to disclose. . . ." 588 F.2d at 758. The parties in *St. Germain* did not seek review of that decision by this Court. *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* at 25, n.10.

1. The Narrow Issue Presented in This Case

The case now before the Court is simply illustrative of the larger problem being confronted by creditors in connection with innumerable issues that arise under the Act and Regulation Z. In their petition for certiorari, the Petitioners have detailed the inconsistent resolutions of the central issue presented in this case: when the creditor discloses its practice of rebating unearned finance charges on prepayment, is it necessary to disclose separately the creditor's rebate practice if the consumer "prepays" following the creditor's exercise of its right of acceleration. even though the creditor pursues the same rebate practice for prepayment both before and after acceleration.

The Board has resolved this issue against separate disclosure if there is no difference between prepayment that follows acceleration and voluntary prepayment that precedes acceleration. The courts, however, have not been satisfied to abide by this resolution. As the Petitioners accurately observed:

> The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions.[25]

[25] *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* at 10. Since that *Petition* was filed, the Seventh Circuit has also issued an opinion, on July 12, 1979, addressing this issue. *See Croysdale v. Franklin Savings Association,* No. 78-1364 (7th Cir. July 12, 1979).

2. Other Substantive Inconsistencies

Illustrations of other disagreements among the courts are abundant. Most important are the inconsistent rulings dealing with substantive rules governing the disclosures to be made at the time of the credit transaction. These inconsistencies render advance planning impossible for multi-state creditors and make uniform national disclosures unattainable. Advance planning for compliance with the Act involves time consuming and costly creditor activities, including the preparation and distribution of forms, computer programming and the training of personnel. A classic example of the dilemmas posed by conflicting decisions is presented in this case. Petitioner Ford Motor Credit Company, using virtually identical forms, has been held to be in compliance with prepayment disclosure requirements in two Courts of Appeals and in violation of that same requirement by a third Court of Appeals.[26] Even localized creditors face problems from consumers who move from jurisdiction to jurisdiction.

Among the existing inconsistencies now affecting creditors at the planning stage are:

(a) *Who Must Make Disclosures When Multiple Creditors Are Involved*

Most courts agree that a retailer will be an "arranger" of credit if the retailer participates in the preparation of loan documents and has knowledge of their terms. There is a split of authority, however, as to whether the retailer alone must make required disclosures or whether both the retailer and lender must make them.[27]

[26] *Compare Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975), and *Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1978) *with Milhollin v. Ford Motor Credit Co.,* 588 F.2d 753 (9th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1487).

[27] *Compare Manning v. Princeton Consumer Discount Co.,* 533 F.2d

(b) *Itemization of License, Title and Registration Fees*

Regulation Z provides that some charges are excludable from the finance charge if itemized and disclosed as part of the amount financed. The courts have disagreed, however, as to whether license, title and registration fees must be separately itemized or can be combined in a single figure designated, for example, as "official fees."[28]

(c) *Method of Identifying Multiple Creditors*

Regulation Z requires that in transactions where there is more than one creditor, each creditor shall be clearly identified. There is a split of authority, however, as to whether this identification must be disclosed together with other required disclosures or whether it simply can be included in any portion of the contract.[29]

(d) *Location of Date for Exercise of Credit Insurance Option*

There is a split of authority as to whether the signed request for optional credit insurance must be separately dated at the signature line or whether it is sufficient that

102 (3d Cir.), *cert. denied*, 429 U.S. 865 (1976), *with Hinkle v. Rock Springs National Bank*, 538 F.2d 295 (10th Cir. 1976), and *Price v. Franklin Investment Co.*, 574 F.2d 594 (D.C. Cir. 1978).

[28] *Compare Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977); and *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976) *with* FRB Official Staff Interpretation No. FC-0124, [1974-77 Tranfer Binder] Cons. Cred. Guide (CCH) ¶ 31,724 (Oct. 14, 1977). Some courts still require separate itemization. *See Smith v. Lewis Ford, Inc.*, 456 F. Supp. 1138 (W.D. Tenn. 1978).

[29] *Compare Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652 (8th Cir. 1978); *Rogers v. Frank Jackson Lincoln-Mercury*, 458 F. Supp. 1387 (N.D. Ga. 1978); *Cenance v. Bohn Ford, Inc.*, 430 F. Supp. 1064 (E.D. La. 1977); and *Lauletta v. Valley Buick, Inc.*, 421 F. Supp. 1036 (W.D. Pa. 1976) *with Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1487); *Sharp v. Ford Motor Credit Co.*, 452 F. Supp. 465 (S.D. Ill.

the date of the signature appear elsewhere in the note or contract containing the disclosures.[30]

(e) *Adequacy of the Description of Property Subject to a Security Interest*

Under Regulation Z, creditors are required to disclose a description or identification of the type of security interest taken by the creditor and provide a clear identification of the property to which it relates. There is a substantial split of authority as to the detail with which property subject to a security interest must be disclosed and, specifically, as to the necessity of itemizing the property involved.[31]

(f) *Disclosure Format*

Regulation Z requires that disclosures be made in a clear and conspicuous manner and in a meaningful se-

1978); *Augusta v. Marshall Motor Co.*, 453 F. Supp. 912 (N.D. Ohio 1977); and *Grey v. European Health Spas, Inc.*, 428 F. Supp. 841 (D. Conn. 1977).

[30] *Compare Hayslip v. Dunlap Chevrolet Co.*, 560 F.2d 192 (5th Cir. 1977); *Meehan v. Nelsonville Mobile Home Sales*, 387 F. Supp. 1395 (S.D. Ohio 1975); *Porter v. Household Finance Corp.*, 385 F. Supp. 336 (S.D. Ohio 1974); *Doresey v. Termplan, Inc.*, 5 Cons. Cred. Guide (CCH) ¶ 98,691 (N.D. Ga. 1974) (typewritten date sufficient); *Young v. Ouachita National Bank*, 428 F. Supp. 1323 (W.D. La. 1977) (same result) *with Hamilton v. G.A.C. Finance Corp.*, 5 Cons. Cred. Guide (CCH) ¶ 98,804 (N.D. Ga. 1974); *Brown v. Commercial Credit Plan, Inc.*, [1969-73 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 98,976 (N.D. Ga. 1973); *Jenkins v. Rhodes Furniture, Inc.*, No. 16266 (N.D. Ga., filed June 29, 1973); and *McTerry v. Household Finance Corp.*, 5 Cons. Cred. Guide (CCH) ¶ 98,803 (N.D. Ga. 1974).

[31] *Compare Madison v. United Finance Co.*, 571 F.2d 1125 (9th Cir. 1978); *Jones v. Goodyear Tire & Rubber Co.*, 442 F. Supp. 1157 (E.D. La. 1977); *Sneed v. Beneficial Finance Co.*, 410 F. Supp. 1135 (D. Haw. 1976); and *Cadmus v. Commercial Credit Plan, Inc.*, 437 F. Supp. 1018 (D. Del. 1977) *with Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363 (5th Cir. 1977); *Burroughs v. Local Acceptance Co.*, 432 F. Supp. 752 (W.D. N.C. 1977).

quence. The courts have reached contrary determinations, however, as to whether the Act requires horizontal as opposed to vertical columns, subtractional as opposed to additional sequences, and specific groupings of related items.[32]

(g) *Disclosure of Loan Proceeds*

The courts have split on whether, in order to avoid civil liability, creditors must state the amount of the loan proceeds, exclusive of other charges that are financed. The Fifth Circuit requires loan proceeds to be disclosed separately, while the Seventh Circuit holds that where the lender's disclosures are in good faith conformity with Regulation Z, there is no liability for failure to disclose the amount of loan proceeds.[33]

B. The Volume Of Litigation Is Enormous And Often Involves Trivial Issues

It is impossible to determine the number of alleged violations raised and the number of lawsuits actually

[32] *Compare Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885 (1976); and *Barber v. Kimbrell's, Inc.*, 424 F. Supp. 42 (W.D. N.C. 1976), *aff'd on this ground*, 577 F.2d 216 (4th Cir.), *cert. denied*, 99 S.Ct. 329 (1978) *with Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979); and FRB Off. Staff Int. No. FC-0054, [1974-77 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552 (Mar. 21, 1977).

[33] *Compare Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977); *McGowan v. Credit Center of North Jackson, Inc.*, 546 F.2d 73 (5th Cir. 1977); *Liner v. Aetna Finance Co.*, 555 F.2d 1241 (5th Cir. 1977); and *Ballew v. Associates Financial Services Co.*, 450 F. Supp. 253 (D. Neb. 1976), *with DeJaynes v. General Finance Corp.*, 442 F. Supp. 377 (S.D. Ill. 1977), *modified sub nom. Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979); and *Johnson v. Household Finance Corp.*, 453 F. Supp. 1327 (S.D. Ill. 1978).

brought under the Act.[34] One statistic alone, however, is illustrative of the extent to which judicial resources are being devoted to alleged violations of the Act. Since 1972, there appear to have been more than 14,000 cases brought in United States District Courts involving Truth in Lending claims.[35] The conclusion is inescapable that the Act has generated an untold amount of litigation, much of which involves no significant policy question or substantial wrong. Rather, the allegations often involve nothing more than technical violations of matters that do not bear on credit cost shopping and merely impose a penalty on creditors unable to chart the shifting shoals created by a constant flow of court determinations.

The disclosure requirements must, of course, effectuate the Congressional purpose of the Act. However, many of the cases under the Act have been brought by consumers who were not misled or misinformed by the credit disclosures that they attack. Yet most courts have held that they have no discretion with respect to the imposition of civil liability if they find a violation of the Act or Regula-

[34] The annual reports of the Director of the Administrative Office of the United States Courts compile Truth in Lending Act cases in a category that also includes a minimal number of odometer fraud cases filed under the Motor Vehicle Information and Cost Savings Act and cases filed under the Interstate Land Sales Full Disclosure Act. In addition, no accurate figures exist as to the number of cases brought in state courts.

[35] 1975 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 32, p. 221; 1978 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 34, p. 211; 1979 *Annual Update* (from computer printout). The Administrative Office of the United States Courts first began tabulating Truth in Lending cases in 1972, and the 1979 computer printout is current through June 30, 1979. Precisely 14,344 cases were brought in the reporting category that includes Truth in Lending. Based on The Association's experience in this area and informal conversations with staff members of the Administrative Office it seems that virtually all cases contained in this reporting category involve claims raised under the Act.

tion Z, no matter how technical. *See Grant v. Imperial Motors,* 539 F.2d 506, 510 (5th Cir. 1976). This is true even if the violation is miniscule in scope and amount. *Id.* In the absence of guidance from the Board, upon which creditors can rely, this situation produces a powerful incentive to litigate any arguable or even not so arguable position.

As a result, creditors and the courts have become embroiled in such issues as whether required disclosures must be made *vertically* rather than *horizontally,* and whether "subtractional disclosures" may be used. *Basham v. Finance America Corp.,* 583 F.2d 918 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979); *Allen v. Beneficial Finance Co.,* 531 F.2d 797, 801 (7th Cir.), *cert. denied,* 429 U.S. 885 (1976). *See also Sanders v. Auto Associates, Inc.,* 450 F. Supp. 900, 904 (D. S.C. 1978).

In *Powers v. Sims & Levin Realtors,* 396 F. Supp. 12 (E.D. Va. 1975), *aff'd in part, rev'd in part,* 542 F.2d 1216 (4th Cir. 1976), the defendant's disclosure statement read:

FINANCE CHARGES:

INTEREST		$2,093.15
BROKERAGE		250.00
TOTAL FINANCE CHARGES		$2,343.15

Plaintiff argued that Regulation Z requires creditors to disclose "the total amount of the finance charge, with description of each amount included, using the term 'finance charge'."[36] The court found that the "total amount of

[36] 12 C.F.R. § 226.8(d)(3).

the finance charge," explicitly required to be labelled as a "finance charge," was instead denoted as "TOTAL FINANCE CHARGES" in defendant's disclosure form. In ruling against the creditor the court stated:

> This requirement is quite technical, but the Congress did not intend creditors to escape liability where only technical violations were involved. Indeed, the technical requirements of the act must be strictly enforced if the goal of standardization of terms, which is a requisite if consumers are to be able to make meaningful comparisons of available credit alternatives, is to be achieved. The Court concludes that, since the defendant has failed to state the total amount of finance charge using the term "finance charge," it has violated § 226.8(d)(3) of 12 C.F.R. and summary judgment shall be entered for the plaintiff.

396 F. Supp. at 20. The Association respectfully suggests that this sort of litigation is simply not a fruitful use of court time or litigants' funds.

III. THE BASIC POLICY ISSUES: THE NEED FOR CERTAINTY AND COMPREHENSIVE RULES

A. The Need For Uniformity And Predictability

The major need both for creditors attempting to comply with the Act and for consumers seeking comparable credit costs, is for a single set of consistent rules. In most instances, the precise shape of the final rule is of far less importance than that there be one specific, understandable rule, drafted by the agency familiar with the regulated area, to provide a comprehensive response not limited to the facts of a specific case.

Because of their technical nature, as shown by the liti-

gated examples described above, alternative resolutions of most questions arising under the Act make very little difference either to creditors or to consumers. As in the case now before this Court, the precise form and shape of the rule adopted is insignificant when compared to the need for one, and only one, uniform and nationally recognized rule. Creditors can and will prepare disclosure forms that reflect *any* rule regarding pre- and post-acceleration prepayment rebate rights. Their not unreasonable plea is that there be a clear and comprehensive enunciation of a single rule and a universal judicial recognition that creditors can look to that rule with safety. There is no court of nationwide jurisdiction to provide the uniformity, such as the Temporary Emergency Court of Appeals brings to administrative utterings of the Department of Energy. As a result, either this Court, the Board, or no one at all will fulfill that function.

B. Deliberative Rulemaking Is The Method That Should Be Used To Establish Comprehensive Rules To Implement The Technical Requirements Of The Act

Because resolution of these issues is often (1) technical and (2) of little practical or policy import, the courts often arrive at inconsistent resolutions. For this reason alone, in addition to the burden on the courts, adjudication is a poor choice upon which to place primary reliance for development of a singular and comprehensive rule. Far preferable is the alternative contemplated by Congress: to place primary reliance upon the Board to implement the Act. In the Truth in Lending area, the Board, and only the Board, acting within constitutional and procedural safeguards, should be allowed to implement and interpret the requirements contained in the Act. Once the

Board has spoken on these technical issues, the courts should acknowledge and defer to these administrative resolutions.

The Association submits that Truth in Lending is uniquely well suited to reliance on administrative rulemaking. Rules must be carefully fashioned in order to apply to widely diverse consumer credit transactions. Adopting those rules requires extensive knowledge of, and appreciation for, nationwide credit practices and procedures. In addition, many of these rules involve precise line drawing that is often not available to courts that are confined to addressing the specific facts of the case before them. The inability of a court to provide a complete rule often has resulted in more questions being raised than resolved. *See, e.g., Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979).

In addition, the mechanism through which creditors must discharge their obligations under the Act—detailed disclosure statements often integrated with retail installment sales contracts or promissory notes—highly commends the use of prospective rulemaking that affords an opportunity to implement new or revised disclosure requirements. The broad range of transactions covered by the Act has generated an imposing number of disclosure forms that are often distributed throughout a credit seller's retail network or a bank's branch system. For instance, as a nationwide creditor, Petitioner Ford in this case must distribute forms all over the country. In light of this comprehensive paper network, it is literally impossible to comply instantaneously with a court decision that immediately renders innumerable disclosure forms unlawful. The sheer mechanical task of drafting new disclosure pro-

visions, having disclosure forms printed, collecting obsolete forms, distributing new forms and training personnel in the use of new forms simply should not be required each time a court adopts a new or slightly different interpretation of the Act or Regulation Z. Moreover, such changes as are required should be preceded by an adequate amount of lead time that is simply not available when responding to court decisions that are immediately effective when a decision is announced.

In short, the technical nature of the Act's requirements, the need for a single national rule and the importance of prospective application that provides sufficient time for the physical task of replacing old disclosure forms make the resolution of the myriad of issues arising under the Act uniquely suited for resolution by an administrative agency, in this case, the Board.

IV. CONGRESS CLEARLY INTENDED THAT THE FEDERAL RESERVE BOARD, ACTING THROUGH BOTH REGULATIONS AND INTERPRETATIONS, WAS TO IMPLEMENT THE ACT. THAT ROLE SHOULD BE ACKNOWLEDGED BY THE COURTS

A. The Legislative History Clearly Demonstrates That Congress Delegated To The Board The Responsibility To Create A Uniform National System Of Consumer Credit Disclosures

The purpose of the Act, as delineated by Congress, is to assure "a meaningful disclosure of credit terms" to enable the consumer to shop for the best credit terms and "avoid the uninformed use of credit."[37] Congress designated the Board as the agency charged with the implementation and enforcement of the Act,[38] and accorded the Board broad powers to promulgate regulations to implement the Act. Creditors were directed to comply with the Board's regulations.[39] As this Court stated in *Mourning:*

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.

411 U.S. at 364.

Pursuant to its statutory grant of authority, the Board promulgated Regulation Z, reflecting the Board's expertise in the area regulated by the Act. Recognizing that even broad authority to adopt regulations was not sufficient to assure responses to technical questions arising under the Act, Congress has twice amended the original Act to provide for additional sources of interpretation. Section 130(f) of the Truth in Lending Act in its current form provides:

> (f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[40]

[37] 15 U.S.C. § 1601.

[38] 15 U.S.C. §§ 1604, 1607.

[39] 15 U.S.C. §§ 1604, 1631(a).

[40] 15 U.S.C. § 1640(f).

This provision was adopted in two stages. A 1974 amendment first established a defense limited to compliance with any rule, regulation or interpretation thereof by the Board.[41] The defense was broadened in 1976 to include conformity by a creditor with any "interpretation or approval" by any official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals.[42]

The Congressional desire to curtail litigation and promote predictability in Truth in Lending is obvious from the language of § 130(f). The legislative history emphatically confirms this. The first effort to provide greater interpretative certainty was made in 1973, when the Senate

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[41] Pub. L. No. 93-495, Title IV, § 406, 88 Stat. 1518 (Oct. 28, 1974). That amendment added § 130(f):

> (f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

[42] Pub. L. No. 94-222, § 3(b), 90 Stat. 197 (Feb. 27, 1976). This amendment added the following italicized text:

> (f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board *or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor,* notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, *or approval* is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

This detailed mechanism for providing authoritative interpretations has since been used in two other statutory schemes. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(e), and Electronic Fund Transfer Act, 15 U.S.C. § 1693m(d).

Committee on Banking, Housing and Urban Affairs reported S. 2101. Among other amendments, the bill provided a defense for compliance with rules, regulations and interpretations of the Board. S. 2101 passed the Senate, but was never acted upon by the House.[43] Titles I and II of this bill, however, subsequently were offered as amendments to H.R. 11221,[44] and this amended bill was adopted by Congress on October 10, 1974.[45] Section 406 of that act provided the § 130(f) good faith compliance defense.[46]

The Conference Report to H.R. 11221 tersely states:

> The Senate bill provided a series of basically technical amendments designed to improve the administration of the Truth in Lending Act. The House bill contained no comparable provisions. The conferees accepted the Senate provisions.[47]

The Senate Report, however, which accompanied S. 2101, the source of the H.R. 11221 defense provision, provides the following explanation of the purpose of the amendment:

> The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act. Accordingly, the

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[43] S. 2101 was passed by the Senate 90-0 on July 23, 1973. *See* 1973 *Congressional Quarterly Almanac* 51-S.

[44] *See* 120 *Cong. Rec.* 19210 (1974).

[45] Pub. L. No. 93-495, Title IV, 88 Stat. 1518 (Oct. 28, 1974). For passage details, *see* 120 *Cong. Rec.* 34770 (1974) and 120 *Cong. Rec.* 34886 (1974).

[46] Pub. L. No. 93-495, Title IV, § 406, 88 Stat. 1518 (Oct. 28, 1974) (codified at 15 U.S.C. § 1640(f)).

[47] H. Conf. Rep. No. 93-1429, 93rd Cong., 2nd Sess. 37 (Oct. 4, 1974).

> Committee recommends an amendment to Truth in Lending requested by the Board which would relieve a creditor of any civil liability under Truth in Lending for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be approved by the Board itself and not merely by the staff of the Board. This amendment is contained under section 206 of Title II.
>
> The Committee is also mindful of the uncertainty of many creditors as to whether their particular disclosure form and related procedures are in compliance with Truth in Lending and the Board's regulations. The Committee expects the Board to use its new authority under Section 206 to reduce the burden of complying with Truth in Lending. One method for accomplishing this objective would be for the Board to publish standard disclosure forms, which if adhered to, would be deemed by the Board to be in compliance with the Truth in Lending Act and the Board's regulations. In addition to removing many uncertainties and preventing hyper-technical litigation, this approach has the added advantage of encouraging standardized disclosure formats, thereby enabling consumers to become more aware of the information disclosed.[48]

The Senate Report provides helpful insight into the Congressional intent behind its effort, in the words of the floor managers, to "improve the administration" of the Act.[49] The obvious purpose was to provide creditors with a safe

[48] S. Rep. No. 93-278, 93rd Cong., 1st Sess. 13014 (June 28, 1973).

[49] 120 *Cong. Rec.* 34766 (1974) (remarks of Representative Fernand J. StGermain, D-R.I.).

harbor from interpretative uncertainties and to prevent hypertechnical litigation.

Two years later even this authority was found to be insufficient. Section 130(f) was broadened significantly in 1976 to allow creditors to rely on interpretations by any official or employee of the Board duly authorized by the Board to issue the interpretations.[50]

This second extension of the § 130(f) defense resulted from an amendment to Senate Bill S. 2672, made on the floor of the House of Representatives on December 16, 1975, by Representative Fernand J. StGermain (D-R.I.).[51] The language regarding the § 130(f) good faith compliance defense was originally contained in H.R. 10561, a bill reported out of the Consumer Affairs Subcommittee of the House Banking, Currency and Housing Committee on October 28, 1975. In introducing a clean bill reflecting Committee amendments on November 17, 1975,[52] its principal sponsor and the Chairman of the Consumer Affairs Subcommittee, Representative Frank Annunzio (D-Il.), stated:

> This act also addresses itself to the important problem of compliance with the Truth in Lending Act. Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. An amendment to section 130f, the Good Faith Compliance with the Truth in Lending Act, I believe, will help resolve these problems.
>
> Section 130f exempts from liability under truth

[50] *See* n. 42, *supra*.

[51] *See* 121 *Cong. Rec.* 40802 (1975).

[52] *See* 121 *Cong. Rec.* 36926 (1975).

> in lending creditors who are acting in good faith in conformity with any rule, regulation, or interpretation by the Federal Reserve Board. The amendment adds to the exemption any interpretation or approval by an official or employee of the Board authorized by the Board to issue such interpretation or approval under such procedures as the Board may prescribe.
>
> *With formal advisory opinions, creditors will at last have a reliable way to know how to comply with truth in lending.* Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out how to comply. Consumers, creditors, and the Board should find they are involved in less litigation.

(Emphasis added.)[53]

The House amendment was warmly received in the Senate. Senator Jake Garn (R-Ut.), the ranking minority member of the Consumer Affairs Subcommittee of the Senate Banking, Housing and Urban Affairs Committee, commented:

> A most needed House amendment to S. 2672 which I fully support revises section 130(f) of the Truth in Lending Act to authorize the Federal Reserve Board to delegate to an official or employee of the Federal Reserve System the power *to issue binding interpretations of the Truth in Lending Act.* Under the current section 130(f) a creditor is exempted from liability under truth in lending when he acts in good faith in conformity with any rule, regulations, or interpretation by the Federal Reserve Board. This amendment will encourage the Board to aid those acting in good faith to comply with the law. It is particularly needed in the case of small businesses that do not have expensive legal talent to aid them in conforming with this complex law.

(Emphasis added.)[54]

[53] 121 *Cong. Rec.* 36927 (1975) (remarks of Representative Annunzio, D-Il.).

Senator William Proxmire (D-Wi.), Chairman of the Senate Banking, Housing and Urban Affairs Committee and the sponsor of both the original Act adopted in 1968 and S. 2672,[55] stressed that interpretations and approvals issued by duly authorized staff would have a "binding effect in subsequent litigation" and that an "interpretation would constitute an absolute defense to a creditor" until reversed by the Board itself or, presumably, by a court properly applying an appropriate standard of review.

> [T]he House amendment would authorize the Federal Reserve Board to delegate to its staff the authority *to issue interpretations or approvals that would have binding effect in subsequent litigation* over violations of the Truth in Lending Act. That is, compliance with such an interpretation would *constitute an absolute defense* to a creditor until that interpretation was reserved by higher authority.
>
> . . .
>
> The Senate [in exchange for the House accepting Senate amendments proposed to other House amendments] would be accepting the House provision concerning the delegation to Federal Reserve

[54] 122 *Cong. Rec.* 2836 (1976) (remarks of Senator Garn, R-Ut.).

[55] Senator Proxmire replaced former Senator Paul Douglas (D-Il.) as the champion of Truth in Lending legislation after Douglas' defeat in 1967. On January 11, 1967, Proxmire introduced S. 5, a Truth in Lending bill that passed the Senate unanimously by a 92-0 roll-call vote on July 11, 1967. Following a conference with the House of Representatives to resolve differences between S. 5 and H.R. 11601, S. 5 became the basis of the original Truth in Lending Act. *See* 1968 *Congressional Quarterly Almanac* 206-207.

> Board staff of the authority to issue *binding interpretations of the law and regulations.*
>
> Mr. President, there are important provisions in this bill which should not be delayed. I have every reason to believe that the House will be agreeable to the amendments I am offering in a spirit of compromise, and I urge the Senate to accept them.

(Emphasis added.)[56] The Senate concurred in these House amendments as urged by Senator Proxmire, the House agreed with other Senate amendments on February 9, 1976,[57] and the bill was signed by the President on February 27, 1976.[58]

Through this two-step process, creditors were provided a defense under § 130(f) of the Act for any act done or omitted in good faith (1) in conformity with any interpretation, regulation or interpretation thereof by the Board or (2) in conformity with any interpretation or approval by an official or employee duly authorized by the Board to issue such interpretations or approvals. It is plain that the purpose and effect of these amendments was to allow the Board and duly authorized members of its Staff to issue interpretations of the Act and to permit creditors to rely on these interpretations.

Moreover, merely allowing a specific creditor to avoid civil liability in one case will not accomplish this goal. Predictability is necessary for creditors to structure their activities in order to comply with the Act, for uniform administrative enforcement of the Act, and to curtail

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[56] 122 *Cong. Rec.* 2837 (1976) (remarks of Senator Proxmire, D-Wi.).

[57] *See* 122 *Cong. Rec.* 2851-2853 (1976).

[58] 1976 *Congressional Quarterly Almanac* 1026. *See also* 122 *Cong. Rec.* D234 (daily ed. March 1, 1976).

litigation involving the same issue. To effect these goals the Board's authoritative statements should be recognized as being the proper interpretation of the Act. The insufficiency of simply allowing these interpretations to shield the first creditor sued in the first case on a specific issue is illustrated by one court's comment about the "good faith" requirement that conditions the availability of the § 130(f) defense. Clouding the ability of other creditors to avoid civil liability on the basis of Board pronouncements, one court of appeals has suggested that a creditor may lack good faith if *any* court of appeals has rejected a Board pronouncement:

> Section 1640(f) [§ 130(f)] limits its exemption from liability to "good faith" conformity to regulations and interpretations. We do not reach the issue of whether continued adherence by the creditors to their present form of disclosure after at least one circuit has ruled that it is illegal vitiates their "good faith." *See Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir. 1977), *cert. denied*, 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977).

Basham v. Finance America Corp., 583 F.2d 918, 923 n. 7 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979).

B. The Judicial Response Has Varied Widely Since This Court's Guidance In Mourning

In 1973 this Court observed that Congress elected to draw a broad statute and give similarly broad rulemaking authority to the Board.

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with

> the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. . . . In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes" of the Act, Congress specifically stated:
>
> > "These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to prevent circumvention or evasion [of the Act], or to facilitate compliance therewith."

Mourning, supra, 411 U.S. at 365-66 (footnote omitted).

The preeminent role in implementing the Act given to the Board by Congress and recognized by this Court in *Mourning* has been often disregarded by the courts. The complex regulatory framework, adopted in 1968 and fine-tuned through expanding Board powers in 1974 and 1976, has failed to provide clarity and certainty because many courts have merely glanced at Board pronouncements and then rejected them, substituting their own views of the Act and Regulation Z.

1. Judicial Response to Regulation Z

Illustrative of the approach of some courts has been their questioning of the stature of Regulation Z. This Court in *Mourning* determined that the appropriate review standard required that the validity of Regulation Z must be upheld "so long as it is 'reasonably related to the purposes of the enabling legislation'," *Mourning, supra,* 411 U.S. at 369 (citations omitted). In applying this standard of review,

the Court has recognized Regulation Z as a legislative rule. *See American Telephone & Telegraph Co. v. United States,* 299 U.S. 232 (1936); K. Davis, *Administrative Law of the Seventies,* §§ 5.01, 5.03-3, at 145, 159 (1976).

If that were not enough, *Mourning* specifically acknowledged the Board's role and admonished the courts to defer to Board pronouncements:

> That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. [Citations omitted.]

Mourning, supra, 411 U.S. at 371-72.

This Court has also made it clear that the Board may be "designedly creative." Describing *Mourning* in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), the Court observed:

> But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. *See, e.g., Mourning v. Family Publications Service, Inc.* [citation omitted].

428 U.S. at 37, n.40.

Under standard administrative law doctrines, a legislative rule actually creates law and is as binding upon a court as a statute. K. Davis, *Administrative Law Treatise* § 5.05, at 314 (1958). As a legislative rule, Regulation Z is binding on a reviewing court so long as it is within the Board's delegated authority, has been adopted in accordance with appropriate procedural requirements and is reasonably related to the purposes of the Act.

These doctrines have not always prevailed under Truth in Lending. Some, but by no means all, lower courts have recognized the Congressional intent to delegate rulemaking and interpretative powers to the Board. As the court stated in *DeJaynes v. General Finance Corp.*, 442 F. Supp. 377 (S.D. Ill. 1977), *modified sub nom. Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979):

> The obvious intent of the Act was to create, through Board regulations, national standards governing consumer credit. That result can only be achieved by interaction between the chosen administrative agency and the legislative body. All else is chaos. If each court has the power to determine that a regulation of the Board is incomplete, or that it omits some element which the particular court deems essential, then uniform, national application of the Act is an unattainable myth. The construction of the Act would certainly be as divergent as the several views which each of the courts of appeals might espouse.

442 F. Supp. at 381.

Other courts have properly relied upon the Board as the last word and have been reluctant to "fill in holes which the courts perceived in the regulatory matrix." *Martin v. Commercial Securities Co.*, 539 F.2d 521, 525 (5th Cir. 1976). *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), in a similar holding, found the absence of any reference to acceleration clauses in the Act and Regulation Z important:

> In our judgment, no . . . additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board.

577 F.2d at 460.

Regrettably, this deference is not universal. Some courts have felt compelled to add disclosure requirements even in the absence of a statutory or regulatory mandate. In *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), implicitly rejecting the role ascribed to the Board by Congress, the court stated that Congressional silence should not deter the court from imposing disclosure requirements:

> Congressional silence is a dubious indicium of legislative intent, especially when we are dealing with a statute like TILA, in which Congress traced very few lines on a new large canvass. Despite the lack of articulate draftmanship, TILA manifests Congress' overriding interest in disclosure to provide consumer protection.

573 F.2d at 574.

Judicial analyses such as that contained in *St. Germain* —the single decision relied upon by the court below— undermine the ability of creditors to look solely to the Board for guidance in making credit disclosures and are directly inconsistent with this Court's decision in *Mourning*.

Certain courts have rejected the Board's interpretation of the Act as implemented through Regulation Z. In one instance, the Board, by regulation, specifically authorized the omission of a specific type of disclosure, but one court

imposed the requirement nonetheless. In *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977), the creditor failed to state separately the amount of loan proceeds of which the consumer would have actual use, as opposed to disclosing the amount borrowed. This omission was *in compliance with Regulation Z*, but *failed to comply with the court's interpretation of the Act*. The court held:

> Under § 1604, the Board's powers to make "adjustments and exceptions for any class of transactions" is limited to efforts "to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *The Board's regulation, sought to be justified by a statutory contradiction that appears to us not to exist, cannot be justified* under § 1640. Therefore, we reaffirm our holding that the Act requires that a creditor make a labeled disclosure of actual loan proceeds in accordance with § 1639(a).

552 F.2d at 1144 (emphasis added).

Other courts have steadfastly refused to recognize the binding nature of Regulation Z. *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974), specified the "four sources of law and interpretation" governing this area as (1) the Act, (2) Regulation Z, (3) Federal Reserve Board Interpretation, and (4) Federal Reserve Board Staff opinions. The court then made the defective assertion that the "three latter authorities, *though not binding on the Court*, are entitled to great weight." 499 F.2d at 976 (emphasis added).

In *Jones v. East Hills Ford Sales, Inc.*, 398 F. Supp. 402 (W.D. Pa. 1975), *aff'd*, 532 F.2d 746 (3d Cir. 1976), the

court, citing *Philbeck*, noted the various types of pronouncements that the Board could issue and then stated:

> These latter authorities, including Regulation Z, although not absolute and binding on a Court, are entitled to great weight and deference in construing the requirements of the Truth in Lending Act.

398 F. Supp. at 404.

Thus some courts, despite this Court's declarations in *Mourning*, have cast a shadow over the ability of creditors to look to, and rely upon, even Regulation Z.

2. *Board and Staff Interpretations Receive Uneven Treatment and Are Often Disregarded by Courts*

In addition to attempting to "second guess" the Board's policy determinations as reflected by Regulation Z, interpretations from the Board and its Staff have a checkered career in the courts, notwithstanding their often "official" status and their express recognition by Congress. Other courts have, in many cases, virtually ignored these carefully considered interpretations.

(a) *Numerous and Discordant Formulations of the Due Deference Test Render It Meaningless and Obsolete*

In considering Official Board Interpretations, Official Staff Interpretations and Unofficial Staff Interpretations, the courts have fashioned a wide array of tests as to the weight to be afforded to them.

Official Board Interpretations are "entitled to great weight," *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976 (5th Cir. 1974) (general reference); and are "entitled to great deference and it compels our reversal of the district court's alternative holding," *Meyers v. Clearview*

Dodge Sales, Inc., 539 F.2d 511, 517 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) (referring to a specific Board Interpretation, 12 C.F.R. § 226.820).

An Official Staff Interpretation, "although not binding on the Courts, is entitled to respect," *Griffith v. Superior Ford*, 577 F.2d 455, 458 (8th Cir. 1978) (referring to FC-0054);[59] *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 574 (9th Cir. 1977) (referring to FC-0054); is "entitled to some deference" or to " 'mere deference';" *Tarplain v. Baker Ford, Inc.*, 466 F. Supp. 1340, 1347 (D. R.I. 1979) (referring to FC-0054); is "entitled to deference," *McDaniel v. Fulton National Bank*, 571 F.2d 948, 950 (5th Cir. 1978) (referring to FC-0054); and to these pronouncements "a Court . . . owes great deference," *Harvey v. Housing Development Corp.*, 451 F. Supp. 1198, 1206 (W.D. Mo. 1978) (referring to FC-0096).

Unofficial Staff Interpretations are "entitled to deference," *Basham v. Finance America Corp.*, 583 F.2d 918, 925 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979) (referring to Unofficial Staff Interpretations Nos. 829, 983 and 1053);[60] "entitled to great weight," *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976 (5th Cir. 1974); "entitled to substantial weight," *Taylor v. R. H. Macy & Co.*, 481 F.2d 178, 180 (9th Cir.), *cert. denied*, 414 U.S. 1068 (1973) (referring to an Unofficial Staff Interpretation); a source " 'to which courts . . . may properly resort for guidance,' " *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974) (referring to several Unofficial Staff Interpretations);

[59] The Board designates Official Staff Interpretations as "FC— ——". The FC designation, referring to Fair Credit, distinguishes Interpretations of the Act. Unofficial Staff Interpretations are simply designated as "No. ——".

[60] See n. 59, *supra*.

"entitled to substantial deference," *Gantt v. Commonwealth Loan Co.*, 573 F.2d 520, 523 (8th Cir. 1978) (referring to Unofficial Staff Interpretations No. 624); usually held valid "unless plainly erroneous or inconsistent with the statute," *Manning v. Princeton Consumer Discount Co.*, 390 F. Supp. 320, 321 (E.D. Pa. 1975), *aff'd.*, 533 F.2d 102 (3d Cir.), *cert. denied*, 429 U.S. 865 (1976) (referring to an Unofficial Staff Interpretation); "entitled to be weighed carefully" and "especially valuable as guides to the Board's understanding of its own regulations or interpretations," *Charles v. Krauss Co.*, 572 F.2d 544, 548 (5th Cir. 1978) (referring to Unofficial Staff Interpretation Nos. 825, 1016 and 1154); "entitled to weight" and "the force with which these least authoritative pronouncements are allowed to press on the judicial scales, however, must vary with the circumstances of each case," *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1144 (5th Cir.) *(on rehearing), cert. denied*, 434 U.S. 891 (1977); and an "expression of . . . principle [that] is persuasive," *Lipson v. Burlington Savings Bank*, 428 F. Supp. 1073, 1078 (D. Vt. 1977) (referring to Unofficial Staff Interpretation No. 1099).

Some courts do not distinguish among the type and source of the interpretation when determining the weight accorded to the interpretation. Official Board Interpretations and Staff Interpretations, presumably both Official and Unofficial, are "entitled to respect." *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 574 (9th Cir. 1977). Regulation Z, Official Board Interpretations and Unofficial Staff Interpretations are "entitled to great weight." *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976 (5th Cir. 1974). Official Board Interpretations and Unofficial Staff Interpretations are "entitled to great weight, are consistent with the plenary powers granted to the Board, and

are not plainly erroneous. We, therefore, are without authority to overturn these administrative interpretations of Regulation Z and the Act." *Garza v. Chicago Health Clubs, Inc.*, 329 F. Supp. 936, 939 (N.D. Ill. 1971) (referring to a specific Official Board Interpretation, 12 C.F.R. § 226.202 (b), (c) and Unofficial Staff Interpretations dated August 14, 1969 and June 26, 1969).

Courts have also stated that when an Official Staff Interpretation involves an interpretation by an agency of its own regulations, it is "entitled to great weight," but that if the Official Staff Interpretation involves an interpretation of statutory language, "only 'mere deference' is appropriate." *Tarplain v. Baker Ford, Inc.*, 466 F. Supp. 1340, 1347 (D. R.I. 1979).

The absence of a clear and consistent test is responsible, at least in part, for the erratic judicial treatment of agency interpretations. The "due deference" test and its variations are simply no longer meaningful in this complex area and should be replaced by a more certain standard.

(b) *Ill-Defined Concepts of Due Deference Have Contributed to the Disregard of Board Pronouncements*

The profusion of tests that describe the weight to be given to Board pronouncements has allowed many courts to virtually ignore the Board. Illustrative of this problem is the decision in *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977), which declined to follow two Unofficial Staff Interpretations:

> The force with which these least authoritative pronouncements are allowed to press on the judicial scales, however, must vary with the circumstances of each case. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1943). *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In the present case we are offered two Staff Opinion letters which, far from being contemporaneous with the adoption of § 226.8(b)(5), were in fact procured after the decision of the trial court herein. Furthermore, the views expressed in these letters appear to conflict with the view of the disclosure requirement as to after-acquired property that is manifest in the prior Staff Opinion letter of August 22, 1974. CCH Consumer Credit Service ¶ 31151. Section 226.8(b)(5) itself uses the word "will" rather than "may," *and there is substantial judicial authority for the view that the limitation of Uniform Commercial Code § 9-204(2)(b) must be disclosed. Woods v. Beneficial Finance Co. of Eugene*, 395 F. Supp. 9 (D. Or. 1975). *Johnson v. Associates Finance*, 369 F. Supp. 1121 (S.D. Ill. 1974). Under these circumstances *we decline to give controlling weight to the Staff Opinion letters* of December 30, 1975, and May 28, 1976, and we affirm our earlier holding as to disclosure of the extent of a security interest in after-acquired property.

552 F.2d at 1144-45 (footnote omitted; emphasis added).

In *Pedro v. Pacific Plan*, 393 F. Supp 315 (N.D. Cal. 1975), the court considered whether all insurance disclosures had to be made on the same document as other required disclosures. Following the Fifth Circuit requirement that all insurance disclosures were to be on the single disclosure statement, the court rejected a contrary Staff Opinion Letter.

> Although such correspondences are a "valuable tool" in informing the public of the law's requirements, the opinions contained therein are not binding on this, or any other, court. *It is therefore the opinion of this Court that the purpose of the Truth-*

> *in-Lending Act is better served when all its required disclosures are contained on one side of one sheet of paper.* Whereas the burden imposed upon the creditor is slight, the benefit to the borrowing public is substantial. In the end, the informed use of credit is promoted.

393 F. Supp. at 323 (emphasis added).

Tarplain v. Baker Ford, Inc., 466 F. Supp. 1340 (D. R.I. 1979), is one of the most recent cases to consider and reject Official Staff Interpretation FC-0054 and Unofficial Staff Interpretation No. 1208 regarding disclosure of acceleration clauses. The court stated that although "staff interpretations are entitled to some deference, to the extent that they are inconsistent with the statute, the Court need not follow them." 466 F. Supp. at 1347. The Court, considering *its* view of the statute to be a preferable alternative, rejected both Official and Unofficial Staff Interpretations, after reviewing statutory and regulatory provisions and speculating about consumer knowledge and awareness.

> The average consumer cannot be expected to realize that absent a clause to a different effect, voluntary prepayment is assumed to be the same as involuntary acceleration. *Consequently, the Court concludes that it is not bound by the FRB staff interpretations.*

466 F. Supp. at 1348 (emphasis added).

It is precisely this lip service paid by courts to the Board's interpretations—noting deference, then substituting their own judgment—that has resulted in the confused, discordant state of the law in this area.

In the absence of a clear rule of deference to administrative rulings, the Congressional goal of meaningful, uniform credit cost disclosure is thwarted. Liberal construction of the statute becomes an interpretative mechanism through

which the courts embrace a policy review of each of the Board's pronouncements on an issue-by-issue basis. Conflicting interests must be balanced, but not by second guessing each decision of the Board. The paramount interest is that the consumer be fully and meaningfully informed about the credit transaction. A second, but almost equally important, interest is that creditors be sufficiently certain of their obligations that they are able to structure the disclosures of a credit transaction with confidence that they are in compliance with the law.

In summary, the major problem with judicial treatment of Truth in Lending is that, in the absence of proper deference to Regulation Z and the interpretations of the Board and its Staff, each federal court becomes a super-legislature or a super-administrator, often disrupting and negating the power and authority that Congress entrusted to the Board. A decision imposing disclosure or other requirements that transcend those mandated by the Regulation or interpretations by the Board or its Staff entails a legislative determination under the guise of judicial interpretation.

V. A "PLAINLY ERRONEOUS" STANDARD FOR OFFICIAL INTERPRETATIONS IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT AND WITH SOUND ADMINISTRATIVE LAW PRINCIPLES. THE ROLE OF REGULATION Z AND UNOFFICIAL INTERPRETATIONS SHOULD BE CLARIFIED

A. Unless "Plainly Erroneous," Official Board Interpretations And Official Staff Interpretations Should Be Binding On Courts

An Official Interpretation by the Federal Reserve Board or an Official Staff Interpretation by its duly authorized Staff should be binding on a court unless the court finds it

to be plainly erroneous. This approach is consistent with the regulatory scheme envisioned by Congress and is grounded in sound principles of administrative law and judicial economy.

Congress initially granted the Board important interpretative and enforcement powers under the Act, including rulemaking authority. Dissatisfied with the welter of litigation that ensued in 1974 and 1976, Congress authorized the Board to adopt a procedure through which to issue interpretations, and provided that acts that were in good faith conformity with "rules," "regulations," "interpretations" and "approvals" would constitute a defense to civil liability under the Act.

As noted above, Congress intended that the interpretations and approvals authorized by the Congress would be *binding* on the courts in subsequent litigation; not that the courts should merely pay widely divergent degrees of deference to them. The Board, in implementing this Congressional mandate, determined that only Official Board Interpretations and Official Staff Interpretations would be of the stature contemplated by Congress. Thus, these Interpretations, as indicated by the legislative history, must be binding upon the courts until the Interpretation relied upon is reversed by a higher authority.[61] Furthermore, the

[61] *See* text at nn. 51-56, *supra*. The legislative history is consistent with the recognition by several courts that Staff Interpretations are to be considered the opinion of the Board unless the Board rules to the contrary. *See Johnson v. McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 267, n. 23. That court cited with approval a summary of the applicable rule regarding the weight of Staff opinions:

> A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide opinions on regulatory provisions, an essential part of its operations.
>
> It is the Board's view that the public is entitled to rely upon a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board.

FRB Letter No. 444, [1969-74 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,640 at 66,283 (Mar. 1, 1971).

See also Gennuso v. Commercial Bank & Trust Co., 566 F.2d 437, 442, n. 13 (3d Cir. 1977); *Sneed v. Beneficial Finance Co., supra,* 410 F. Supp. at 1141, n. 7 (quoting the letter).

Board has established a specific procedure through which interested parties can seek Board review of positions taken by the Staff in Interpretations.[62]

This Court has stated that when a court interprets an administrative regulation, it must necessarily look to the construction given the regulation by the agency responsible for its promulgation. In *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), this Court stated:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of control-*

[62] *See* n. 15, *supra*.

> *ling weight unless it is plainly erroneous or inconsistent with the regulation.*

325 U.S. at 413-14 (emphasis added).

This rule is uniquely appropriate to the Board and its interpretations of the Act and Regulation Z, and those of duly authorized Staff who issue Official Interpretations pursuant to the Congressional authorization contained in § 130(f). Controlling weight is due these Official Interpretations because of (a) the broad and general nature of the Act, (b) the express delegation of interpretative and enforcement powers by Congress, (c) the technical character of the subject matter, and (d) the fact that there is often little substantial difference among various possible approaches.

The subjects of Official Board and Staff Interpretations involve precisely the kinds of policy decisions that Congress entrusted to the Board by granting such broad powers. As stated in *Bone v. Hibernia Bank,* 493 F.2d 135 (9th Cir. 1974):

> We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case. While reasonable minds may differ as to which alternative would best suit the purposes of the Act, "courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 372, 93 S.Ct. 1652, 1662, 36 L.Ed.2d 318 (1973).[63]

493 F.2d at 140.

The axiom of judicial review that an administrative agency's interpretation of its own regulation has "controlling weight unless it is plainly erroneous," enunciated by this Court in *Bowles v. Seminole Rock & Sand Co., supra,* is especially true in the area of Truth in Lending. Regulation Z and its Official Interpretations incorporate technical administrative expertise and a familiarity with credit practices acquired by the Board and Staff through long experience with the intricacies of this comprehensive regulatory area. When this combination of a highly technical area and administrative expertise exists, *Allen M. Campbell Co. General Contractors, Inc. v. Lloyd Wood Construction Co.,* 446 F.2d 261 (5th Cir. 1971), states:

> [J]udges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency. If the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other.

446 F.2d at 265. This Court closely circumscribed the available options of a court engaged in the judicial review of an

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[63] It is ironic that this lucid expression of the proper role to be played by Board pronouncements was produced by the same Circuit (although by a different panel) whose rejection of Board pronouncements resulted in this case being before the Court. This supplies further evidence that —even within a given Circuit—there exist divergent views as to the weight to be given to the Board's Interpretations. Presumably, this means that the extent to which a creditor in that Circuit can rely on the Board's statements may depend on the composition of the panel that hears its appeal.

administrative interpretation in *American Telephone & Telegraph Co. v. United States,* 299 U.S. 232, 236 (1936):

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.

See also this Court's statement in *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

Despite the consistent recognition by this Court of the need for judicial deference to administrative pronouncements, the courts in applying the Act and Regulation Z have disregarded or given a perfunctory nod to Official Board and Staff Interpretations. To avoid continued confusion and needless litigation, the Court should adopt the unmistakable rule that these Interpretations are binding upon the courts unless they are *plainly erroneous.*

B. The Confused Status Of Regulation Z Should Be Clarified

As discussed above, various courts have felt free to add disclosure requirements to Regulation Z, have imposed disclosure requirements contrary to the express provisions of Regulation Z and have rejected the binding nature of Regulation Z. These decisions are clearly contrary to this Court's pronouncements in *Mourning* and *Usery* and the views of respected commentators.[64] The doubt created by these contradictory cases should be dispelled by a clear enunciation that Regulation Z is a legislative rule and that it is as *binding* on a reviewing court as a statute, so long as it is adopted in accordance with appropriate procedural requirements and is reasonably related to the purposes of the Act.

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[64] *See* text at pp. 34-35, *supra.*

C. Unofficial Staff Interpretations Should Be Accorded "Great Deference" By The Courts

Much confusion surrounds the weight to be accorded Unofficial Staff Interpretations by the courts and the degree of reliance that creditors may place on them. This confusion should be resolved by modifying the standard of judicial review to provide that courts must give "great deference" to Unofficial Staff Interpretations. This test has already found favor with some courts.[65]

Unofficial Staff Interpretations provide creditors with a major source of guidance in complying with the requirements of the Act and Regulation Z. In addition to easing the creditor's compliance burden, as contemplated by the 1974 and 1976 amendments, these interpretations advance the goal of formulating a uniform national policy and a uniform national disclosure standard. Varying degrees of deference and the multiple formulations of this traditional test have rendered the "due deference" test meaningless and have undermined the ability of creditors to rely upon Unofficial Staff Interpretations.

Reviewing courts must be given a clear and consistent rule for determining the weight of Unofficial Staff Interpretations. For a court to disregard such an interpretation, the court should have to find more than that the interpretation appears to be unwise or burdensome or inferior to another. As the Court stated in *American Telephone & Telegraph Co. v. United States, supra,* 299 U.S. at 236-37: "What has been ordered must appear to be 'so entirely at

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[65] *See Harvey v. Housing Development Corp., supra,* 451 F. Supp. at 1206; *Gantt v. Commonwealth Loan Co., supra,* 573 F.2d at 523; *Philbeck v. Timmers Chevrolet, Inc., supra,* 499 F.2d at 976; *Johnson v. McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 267, n. 23; and *Gennuso v. Commercial Bank & Trust Co., supra,* 566 F.2d at 442, n. 13.

odds with fundamental principles of correct [activity]' as to be the expression of a whim rather than an exercise of judgment." As a critically important element of the overall regulatory scheme, the role of Unofficial Staff Interpretations should be recognized by this Court. The courts should be admonished to give these pronouncements *great deference*, rather than the superficial lip service that has characterized the judicial reception to date.

VI. IN DEFERENCE TO THE PROPER ROLE OF OFFICIAL STAFF INTERPRETATIONS, THE DECISION BELOW SHOULD BE REVERSED

Applying the appropriate rule to the case before the Court, the Official Staff Interpretation governing the instant case should be followed and the decision below should be overturned. Under Official Staff Interpretation No. FC-0054, a creditor who pursues a rebate policy that is the same, whether prepayment occurs before or after acceleration, need disclose only its uniform method of making rebates. In this case, both the Petitioners' disclosures and practices follow the dictates of that Official Interpretation and, since the Interpretation falls within the Act, it cannot possibly be said to be "plainly erroneous." The practice pursued by the Petitioners is clearly "in conformity" with the Official Interpretation.

The Ninth Circuit, in the case relied upon by the court below, specifically failed to acknowledge the appropriate status of this pronouncement. Disregarding this Official Interpretation, the court improperly substituted its judgment for that of the Board. The reasoned decision reflected in the Official Interpretation should not be overruled by a court adopting its own version of the regulatory requirements.

The Official Staff Interpretation should be upheld, and the Petitioners' practices in conformity with that Interpretation should be acknowledged as being in compliance with the Act. The decision of the Ninth Circuit should be reversed.

CONCLUSION

Basic concepts of fairness and judicial efficiency, as well as unmistakable Congressional intent, require that the Federal Reserve Board be recognized as the interpretative and administrative source of requirements under the Act in order to provide the single, uniform set of rights and obligations for creditors and consumers alike. The legal disarray presented in this case is merely illustrative of the confusion surrounding the application of the many technical requirements created by the Act. Only through the Court's clear acknowledgment of the role ascribed to the Board by Congress will the Board be encouraged to act, thus reducing the tidal wave of litigation under the Act that has given rise to exorbitant judicial and economic costs.

Respectfully submitted,

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